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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. A-810

HOUSTON WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on February 16, 1979.

CITATIONS TO OPINIONS BELOW

1. Order of the Court of Appeals unreported filed February 16, 1979. (App. A-1)

2. Order of the United States District Court for the Middle District of Tennessee unreported filed April 28, 1978. (App. A-3)

3. Order of the United States District Court for the Middle District of Tennessee unreported filed January 7, 1971. (App. A-4)

JURISDICTION

The Court of Appeals entered judgment on February 16, 1979. On March 16, 1979, Mr. Justice Stewart extended the time for filing this Petition to April 17, 1979. (App. A-6).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I.

Did the Sixth Circuit's decision upholding the Trial Court's refusal to grant the petitioner a meaningful hearing on his challenge to the Court of material factual statements in the search warrant affidavit contradict this Court's ruling in *Franks* v. *Delaware* and violate this petitioner's Fourth Amendment rights?

II.

Did the seven-year, three-month delay between the hearing on the defendant's Motion for a New Trial and the decision on this Motion violate the defendant's Sixth Amendment rights to a speedy trial or his due process rights to a timely and efficient judicial proceeding?

CONSTITUTIONAL PROVISIONS AND STATUTES RELIED UPON

1. Constitution of the United States, Amendment IV:

"*Unreasonable searches and seizures.*—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but

upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Constitution of the United States, Amendment V:

"*Criminal actions—Provisions concerning—Due process of law and just compensation clauses.* —No person shall be able to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law; . . . ."

3. Constitution of the United States, Amendment VI:

"*Rights of the accused.* In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."

4. 18 U.S.C. Federal Rules of Criminal Procedure, Rule 25. Judge; Disability

"(a) *During trial.* If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial."

"(b) *After verdict or finding of guilt.* If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioner respectfully contends that the Writ should be granted because the Trial Court's ruling precluded the defendant from challenging the veracity of the search warrant affidavit in this case.

It is submitted that the recent decision of *Franks* v. *Delaware*, ... U.S. ....., 57 L.Ed.2d 667, ... S.Ct. ..... (1978), should control in this case and that the defendant met the prerequisite preliminary showing under the doctrine of that case. The Sixth Circuit's failure to remand this case for a hearing as to the truth of the search warrant affidavit effectively denies the defendant his Fourth Amendment right to be free from unreasonable searches and seizures.

Petitioner further respectfully contends that this writ should be granted due to the prejudice which amounted to a deprival of due process, caused by the seven-year, three-month delay between the time of the trial and the decision on a Motion for a New Trial. This delay, coupled with the irregular method by which this Motion was finally decided, amount to such a inefficient judicial disposition of the defendant's case that this Court should rule based on its power to supervise the Federal Court systems, that these proceedings amounted to a denial of the standard of justice which this defendant had a right to expect from the Federal Judicial system.

STATEMENT OF THE CASE

Defendant-Appellant Houston Williams was indicted on July 16, 1970, in the United States District Court for the Middle District of Tennessee, Nashville Division. This indictment contained ten (10) counts, each alleging a violation of the Travel Act, 18 U.S.C. §1952. Count One charged the use of an interstate facility to distribute the proceeds of an illegal gambling enterprise; Counts Two through Ten alleged specific uses of an interstate facility (the telephone) with intent to further the illegal gambling operation and subsequent acts to ". . . promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity." The last such use of the telephone interstate was alleged in Count Ten, the date being February 21, 1970.

In advance of trial, the defendant timely filed five (5) motions, including a Motion to Suppress Testimony and Motion to Quash Warrant and Suppress Testimony. A hearing on all motions was held October 13, 1970, before the Honorable Frank Gray, Jr., Chief Judge, at the conclusion of which the Motion to Suppress Evidence and the Motion to Quash Warrant and Suppress Testimony were denied (TR. Vol. I, p. 19), and an Order to that effect, and dated October 13, 1970, was entered on October 15, 1970.

The trial of this cause was conducted before the Honorable Frank Gray, Jr., Chief Judge, on November 12th and 13th, 1970. Before the trial commenced, Count Nine was severed. At the conclusion of the Government's case-in-chief, the defendant moved for a Judgment of Acquittal on Counts One through Eight and Ten. (TR. Vol. II, p. 159) The motion was granted as to Count One, and denied as to all remaining Counts. (TR. Vol. II, p. 160) The motion was then renewed and denied at the close of all the evidence. (TR. Vol. II, pp. 161, 163)

On November 13, 1970, the jury returned with a verdict of Guilty on Count Ten and the announcement that it was deadlocked on Counts Two, Three, Four, Five, Six,

Seven, and Eight. (TR. Vol. II, pp. 210-211) A mistrial thereupon was declared on those Counts and the verdict received as to Count Ten. (TR. Vol. II, p. 213) The Court imposed a fine of three thousand ($3,000.00) dollars and sentenced the defendant to three years imprisonment, suspending all but one hundred and twenty (120) days pursuant to 18 U.S.C. §3651 and placing him on probation for the remainder of the three (3) years. (TR. Vol. II, pp. 216-217) He was allowed to remain on his bond pending further action in the case. (TR Vol. II, p. 217)

On November 27, 1970, the defendant filed a Revised Motion for Judgment of Acquittal and a Motion for a New Trial. At the hearing on the motions, held January 7, 1971, before the Trial Judge, the Motion for Judgment of Acquittal was overruled (TR. Vol. III, p. 4) and all but one of the grounds in the Motion for a New Trial were overruled. (TR. Vol. III, p. 6) The ground reserved was that the Court had erred in excluding evidence of mailings of sports schedules and information from Massillon, Ohio, to an address at Nashville, Tennessee, which address was not connected to the defendant. This evidence had been introduced by the Government and admitted without objection, and then it was excluded *sua sponte* by the Trial Court. (See *infra*)

The case remained under advisement, and the defendant on bond, from January 7, 1971, until April 28, 1978, when the Honorable L. Clure Morton entered an Order denying Item Number 7 of the Motion for a New Trial and thus the Motion itself. The Court had undertaken to resolve the matter pursuant to Rule 25 of the Federal Rules of Criminal Procedure, the former Chief Judge, the Honorable Frank Gray, Jr., having taken Senior Status.

Following the resolution, in favor of the defendant, of certain matters relating to the defendant's right to appeal

a notice of appeal was filed and approved by the Court and the instant appeal ensued.

STATEMENT OF THE FACTS

I. The Suppression Hearing:

As noted *supra*, the defendant filed in advance of trial a Motion to Quash Search Warrant and Suppress Evidence. This motion challenged the validity of the search warrant and supporting affidavit and the legality of the search of an apartment by Government agents on March 7, 1970. Although several grounds were urged in support of the motion, the grounds pertinent hereto were those contained in numbered paragraphs 5 and 6, which, in substance, asserted that the Affidavit in Support of Search Warrant of Special Agent John E. Rodgers, Federal Bureau of Investigation, in parts critical to the determination of probable cause, was false and based on false information. This affidavit is set forth verbatim herein:

> "I, John E. Rodgers, being duly sworn, depose and say that I am a Special Agent of the Federal Bureau of Investigation and as such, I am authorized to make searches and seizures. I state
>
> "That on January 15, 1970, Houston Williams in response to my question as to whether he was engaged in gambling activities advised me that he had run a 'football card' which is used for betting purposes during the 1969-1970 football season.
>
> "That on February 10, 1970, I observed Houston Williams as he drove from his residence on Route 2, River Road in Nashville, Tennessee, in a late model Ford station wagon, wood grain, tan in color, with

a luggage rack affixed to the top of said vehicle bearing License No. JL 2454. Shortly thereafter I observed this same automobile in the parking lot outside the Americana Apartments at 1906 South Street.

"Further, on February 12, 1970, and on subsequent occasions a confidential informant who is reliable and who provided information with regard to other unrelated violations of Federal law within the past ninety days, which information subsequently proved reliable, advised me that Houston Williams was then operating a 'bookie' operation, taking bets and dispensing wagering information on athletic events in Apartment 107 of the Americana Apartments at 1906 South Street in Nashville, Tennessee, and that in this operation he was using two telephones which were listed in the name of Grady Martin. The informant stated further that Houston Williams makes daily long distance telephone calls to a person or persons in another state in order to obtain 'the line' or 'odds' on the outcome of scheduled sporting events. Informant stated that these calls are made from various phone booths in and around Nashville, Tennessee. Informant stated that the source of the informant's knowledge and information is personal observation of the occurrences which the informant related. Informant also stated that the information as set forth was related to the informant by Houston Williams in the course of conversations.

"Further, on February 21, 1970, I observed Houston Williams as he proceeded in a black over tan Lincoln Continental automobile, License No. AK 7713, to the corner of West End and Lyle Avenue, in Nashville, Tennessee, where at approximately 10:22 a.m., he entered a telephone booth, utilized the telephone therein and remained for approximately three minutes. This telephone booth is approximately a block and one-half north of the said Americana Apartments. Shortly thereafter I observed the said Lincoln Continental automobile which was parked on the East side of Americana Apartments located at 1906 South Street, Nashville, Tennessee.

"Further, on February 28, 1970, at approximately 10:30 a.m., I observed Houston Williams as he left the said Americana Apartments from the front entrance on South Street and further, at approximately 10:31 a.m., the same day I observed the said Lincoln Continental parked in the parking lot adjacent to the said Americana Apartments.

.....

/s/ John E. Rodgers, Special Agent,
Federal Bureau of Investigation

Subscribed and sworn to before
me this 6th day of March,
1970.

A. B. Neil, Jr.
U. S. Commissioner"

The defendant's challenge to the truthfulness of the affidavit was directed at the fourth full paragraph in which the affiant set forth assertions pertaining to a confidential informant and information received therefrom, the defendant having contended that the information given by the informant was false and obtained under duress and that the affiant's statements concerning the informant's reliability were "misleading and false."

In support of these grounds, the defendant filed the affidavit of one Donna Holloway, which affidavit likewise is quoted verbatim herein:

AFFIDAVIT

"Donna Holloway, being duly sworn, deposes and says: That she resides at 765 McMurray Drive, Apartment O-5, Huntington Park Manor Apartments, Nashville-Davidson County, Tennessee. That she has at her own request appeared at the office of Dale Quillen, located at 95 White Bridge Road, Nashville, Tennessee, for the purpose of giving a statement in connection with previous conversations had by herself to John E. Rodgers, Special Agent for the Federal Bureau of Investigation.

"I emphasize that I am making this statement freely and voluntarily without promises from anyone, without threats having been made against me by anyone and without any offer of reward whatsoever. I further wish to make it known that I have been advised by Mr. Dale Quillen that I do not have to make this statement. He has in my presence made a telephone call to the U. S. Attorney's Office and talked with Mr. Fred Thompson (I assume it was Mr. Thompson) during which time I heard Mr. Quillen talking with him (Mr. Thompson) and of my presence here and that he, Mr. Thompson, would be welcome to come to Mr. Quillen's office. He also stated that I could talk with Mr. Thompson over the phone if I wished to.

"I have had furnished to me a copy of an Affidavit which was sworn to by John E. Rodgers, Special Agent for the Federal Bureau of Investigation on March 6, 1970, before A. B. Neil, Jr. I have examined this affidavit and particularly the fourth paragraph of same which I am attaching to my affidavit after having initialed the affidavit of Mr. Rodgers.

"In February 1970, I talked with John E. Rodgers on several occasions. I did provide him with certain information relating to some merchandise which had been stolen and later testified in Federal Court in connection with that matter. I did tell Mr. Rodgers that Houston Williams was operating a bookie operation, taking bets. I am not certain that I told Mr. Rodgers that it was apartment 107 of the Americana Apartments, 106 South Street, Nashville, Tennessee, and that he was using two (2) telephones.

"I did not tell Mr. Rodgers or anyone else that Houston Williams made daily long distance telephone calls to person or persons in other states in order to obtain 'the line' or 'odds' on the outcome of scheduled sporting events. I did tell Mr. Rodgers that Houston Williams made long distance telephone calls, but I had no way of knowing to whom the calls were made or whether they were made in the State of Tennessee or elsewhere.

"IN WITNESS WHEREOF, I have hereunto set my signature on this the ..... day of October, 1970."

Donna Holloway

STATE OF TENNESSEE)

COUNTY OF DAVIDSON)

"Donna Holloway, being first duly sworn, makes oath that the statements and facts contained in the foregoing affidavit are true to the best of her knowledge, information and belief and that said affidavit was made of her own free will and for no other

reason whatsoever; that this affidavit was made in sincerity and in truth.

.....

Donna Holloway

Sworn to and subscribed before
me, this ..... day of .....,
1970

.....

Notary Public

S: ....."

In other words, the defendant's challenge to the affidavit was based on the sworn statement of the person mentioned in Agent Rodger's affidavit. The person denied telling Agent Rodgers that the defendant obtained the "line" or "odds" on sporting events from a person (or persons) outside the State of Tennessee by daily long distance telephone calls.

Before the hearing on this motion, the defendant subpoenaed Donna Holloway to testify at the scheduled hearing and was present at the hearing. (TR. Vol. I, p. 9)

At the hearing on October 13, 1970, and before any testimony was presented, the Government interposed an objection to the defendant's challenge as a "no collateral attack" on an otherwise valid warrant. (TR. Vol. I, p. 8) The Court at first overruled the objection and held that the defendant could interrogate the agent with reference to allegedly false statements in the affidavit (TR. Vol. I, p. 9); but when the defendant proposed to call Donna Holloway, the Government again objected. Citing the case of *United States* v. *Gianaris*, 25 F.R.D. 195 (D.C. D.C. 1960) for the proposition that a search warrant affidavit, sufficient on its face, cannot be attacked on the

grounds that some of its averments are false, and that testimony controverting the affidavit is inadmissible (TR. Vol. I, pp. 10, 11), the Government contended that the defendant could not challenge the factual statements in the warrant. The Court thereupon ruled that it would not permit any questioning regarding the informant's reliability, but would allow interrogation of Agent Rodgers on the question of coercion. (TR. Vol. I, pp. 12, 13)

Whereupon the defendant called Agent Rodgers as a witness and attempted to question him about whether he had found the informant in possession of stolen property, however, the Trial Court sustained the Government's objection to that line of questioning (TR. Vol. I, p. 14), and later said that it (the Court) would ". . . ask all the questions I would have permitted [defense counsel] to ask." (TR. Vol. I, p. 15) These questions, and the answers thereto, are set forth below:

"THE COURT: Mr. Rodgers, did you threaten this unnamed informant who is referred to in your affidavit with anything to make the informant give you information?

THE WITNESS: No, I did not.

THE COURT: Did you use any duress or coercion on the informant?

THE WITNESS: No, sir, I did not.

THE COURT: All right. Now, that is as far as I'm going to permit you to go, Mr. Quillen.

MR. QUILLEN: If that is as far as the Court permits, that is as far as I will undertake it.

THE COURT: That is that." (TR. Vol. I, p. 15)

Defense counsel then moved to be permitted to call Donna Holloway "for the purpose of showing that she

was in fact the informant." (TR. Vol. I, pp. 15-16) That motion was overruled and defense counsel abandoned the effort. (TR. Vol. I, p. 16) When the witness, Agent Rodgers, then volunteered that he ". . . would like to emphatically deny that there was any falsehood contained in that," however, defense counsel attempted to cross-examine him concerning whether the informant had been in possession of stolen property; but the Government's objection again was sustained and the matter was laid to rest. (TR. Vol. I, pp. 16-17)

As noted previously, the motion was denied by the Trial Court at the hearing (TR. Vol. I, p. 19) and by Order entered October 15, 1970.

At trial on November 12, 1970, the fruits of the search conducted by the Federal Bureau of Investigation pursuant to that questioned search warrant were admitted in evidence. This evidence included: testimony by Agent Rodgers that he answered several telephone calls in the "line" from the defendant on certain games and the placing of bets (TR. Vol. II, pp. 37-42); a group of photographs of the apartment including pictures of the two telephones (TR. Vol. II, pp. 43-44); and numerous documents involving betting information, point "spreads," rent receipts in the name of Grady Martin (a government witness), a printed football betting card and sports schedules. (TR. Vol. II, pp. 46-51)

The occurrences at trial and the Judge's instructions are not at issue on this appeal.

ARGUMENT

I.

The Sixth Circuit Decision Upholding the Trial Court's Refusal to Grant the Petitioner a Meaningful Hearing on His Challenge to the Truth of Material Factual Statements in the Search Warrant Affidavit Is Contrary to This Court's Ruling in *Franks* v. *Delaware* and Violated the Petitioner's Fourth Amendment Rights.

As demonstrated by the facts recited *supra*, summarizing the pre-trial hearing of October 13, 1970, the Trial Court's rulings precluded the defendant from challenging the veracity of the search warrant affidavit in this case, in that his counsel was prohibited from calling a witness in support of that challenge or from examing the affiant as to the truthfulness of certain specified and material factual allegations set forth in the affidavit. It is respectfully submitted that the recent decision of *Franks* v. *Delaware*, U.S. , 57 L.Ed.2d 667, S.Ct. , 23 Cr.L. 3179 (June 28, 1978), is dispositive of this matter, compelling the conclusion that the defendant was denied his rights under the Fourth Amendment by the Trial Court's actions.

The precise issue in the case of *Franks* v. *Delaware*, *supra*, was whether a criminal defendant *ever* has the right to challenge the truthfulness of factual statements in a search warrant affidavit after the warrant is issued *ex parte*; the Delaware Supreme Court had ruled that under no circumstances could such a challenge be made. The Supreme Court of the United States answered the question in the affirmative and reversed the Delaware Supreme Court. Resolving the issue left open in *Rugendorf*

v. *United States*, 376 U.S. 528, 531-32, 11 L.Ed.2d 887, 84 S.Ct. 825 (1964), a 7-2 majority of the Court, in an Opinion by Mr. Justice Blackmun, held that

> ". . . where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the alleged false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Franks* v. *Delaware*, *supra*, at p. 672.

The Court further amplified on this holding at the conclusion of the Opinion.

> "In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any governmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth Amendment, to his hearing." *Id.*, at p. 682.

Because the factual setting in *Franks* is markedly similar to that at bar, those facts bear reciting herein. On March 5, 1976, Mrs. Cynthia Bailey reported a sexual assault in her home by a man armed with a knife to the police in Dover, Delaware. The assailant was described as to age, race, height, build and facial hair; and Mrs. Bailey also described his clothing as a white thermal undershirt, black pants with a silver or gold buckle, and a dark knit cap worn down around his eyes. On the same day, Franks was arrested for an assault on a 15 year old girl, Brenda B. ..... Before his bail hearing, Franks was alleged to have expressed surprise that the case involved Brenda B. ..... Because he thought her name was Bailey. This statement was passed on to Detective Brooks who had the Bailey case; and, on March 9th, he and Detective Gray submitted a sworn affidavit to search Franks' apartment. This eighteen (18) paragraph affidavit included the clothing description given by Mrs. Bailey and the aforementioned statement by Franks. In an attempt to show that Mrs. Bailey's clothing description matched Franks' typical outfit, the affidavit stated that two employees at the Youth Center had been contacted and had informed the affiants that Franks' normal dress included a white knit thermal undershirt, brown leather jacket, and a large green knit hat. This information regarding the typical attire of Franks was contained in three paragraphs (15-17) in the affidavit. *Id.*, pp. 673-4.

Before trial, defense counsel filed a motion to suppress on the ground that the affidavit failed to show probable cause. This motion was orally amended at the hearing, however, to include an attack on the affidavit's veracity. This attack was based on counsel's assertion that neither Youth Center employee had been interviewed personally by the affiants and, although they may have talked to another officer, their information was "somewhat different" from that set forth in the affidavit. Counsel charged "bad faith" and sought to call the employees as witnesses at the hearing. The State objected to the defendant going behind the warrant in any way, and this objection was sustained by the Trial Court. *Id.* 673-5.

In the instant case, the defendant's challenge to the warrant affidavit was even stronger. The motion itself, in paragraphs 5 and 6, asserted that the affiant's statements regarding the informant's reliability were false and misleading, that the information allegedly obtained from that informant was false, and that the information given by the informant was obtained by duress. Moreover, the affidavit of Donna Holloway denied that certain pertinent information was given the affiant at all. It is clear, then, that the defendant charged that these factual misstatements were deliberately made by the affiant. Unlike the *Franks* case, however, the defendant herein sought to examine the affiant on these matters and had subpoenaed the alleged informant to testify. Furthermore, the contested allegations in the affidavit *sub judice* are far more critical to the determination of probable cause than were those in *Franks* v. *Delaware*.

In short, then, the requirements set forth in *Franks* v. *Delaware*, *supra*, as the conditions precedent to a hearing are met in the instant case. First, the attack was more than conclusory and alleged deliberate falsehood accompanied by an offer of proof, both by way of testimony and sworn affidavit. Second, these allegations were directed to a specific portion of the affidavit, *e.g.*, paragraph 4, and the basis for the attack was set forth. Third, the veracity challenged was that of the affiant, a government agent. Fourth, the challenged portions of the affidavit were necessary to support a finding of probable cause. Without the information supplied by the informant, as recited in paragraph 5, there was no basis for a probable cause finding that the defendant was then engaged in gambling activity at all; without the contested information that the defendant obtained the "line" by daily long-distance calls out-of-state, there was absolutely no basis for a probable cause finding that a federal offense was even involved. See: *Aguilar* v. *Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); *Spinelli* v. *United States*, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969).

It is manifestly clear, therefore, that a hearing on the defendant's challenge was required in this case, *Franks* v. *Delaware* and the proffer made. It is equally clear that the defendant was effectively denied such a hearing by the various rulings of the Trial Court. The Government's objections to the examination of Agent Rodgers and the testimony of Donna Holloway were virtually identical to those sustained by the trial court in *Franks* v. *Delaware*, *supra*, pp. 674-5, and, although the Trial Court concededly did not make an express holding in the words of the Government's objection, the Trial Court's rulings, in effect, sustained the Government's position and, more importantly, precluded the defendant from a meaningful examination of Agent Rodgers as to the veracity challenge and for calling Ms. Holloway as a witness. In any sense mandated by *Franks* v. *Delaware*, there was no hearing on the defendant's veracity challenge.

Inasmuch as the Fourth Amendment requires a hearing under the facts in this case and the defendant was denied such a hearing, the case must be reversed and remanded. *Franks* v. *Delaware, supra.*

II.

The Seven-Year, Three-Month Delay Between the Hearing on the Defendant's Motion for a New Trial and the Decision of the Court on This Motion Violated the Defendant's Right to a Speedy Criminal Proceeding, and His Due Process Right to an Efficient Judicial Proceeding.

The United States Supreme Court in *Pollard* v. *U. S.*, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957), examined the possibility of a due process or speedy trial violation due to a two-year delay in the sentencing of a defendant after verdict. The Court found no purposeful delay in that case and, therefore, no violation of the defendant's rights. A four-man dissent in that case would have overturned the defendant's conviction using the Court's power to supervise the administration of justice in the Federal Court system. The dissenters felt that this delay was an invasion of the basic right of the defendant to expect an efficient judicial proceeding. *Pollard* v. *U. S.* was decided before the case of *Barker* v. *Wingo,* 407 U.S. 514, 92 S.Ct. 282, 33 L.Ed.2d 101 (1972). In *Barker* v. *Wingo* the Supreme Court laid out the four factors that should be considered in deciding if a delay in a trial proceeding approaches constitutional dimensions. These factors were the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial and the prejudice to the defendant caused by a delay in trial.

Since *Barker* v. *Wingo* the Fifth Circuit has, in two cases, applied the *Barker* v. *Wingo* standard to delays in sentencing after verdict. In *Juarez-Casares* v. *U. S.*, 496 F.2d 190 (5th Cir. 1974), there was a 31-month delay between the verdict and the sentence. During that 31-month period, the defendant violated the law again, and as a result of that, the judge's sentence was harsher than it would have been immediately after trial. The Fifth Circuit held that this delay was unreasonable and the defendant was prejudiced by the delay; and therefore, the defendant should be released. In *U. S.* v. *Campbell*, 531 F.2d 1333 (5th Cir. 1976), the Court dealt with a 4-year delay between verdict and sentencing. The Judge ordered a study of the type of sentence to give a multiple-sclerosis victim who, in all likelihood, would die if placed in prison. The Circuit Court specified the *Barker* v. *Wingo* standard as the standard to be applied in delayed sentencing cases within the Fifth Circuit. Since the defendant would have, in fact, committed suicide by demanding his right to go to jail, the Court said that the defendant's assertion of his right should not be weighed heavily in the balancing test. The case was remanded to decide on the other issues, the length and reason for delay, and the prejudice to the defendant.

Although other Circuits have taken a different view, see: *State* v. *Drake*, 259 N.W.2d 862, for a review of the cases from different Circuits, the reasoning of the Fifth Circuit in applying the *Barker* v. *Wingo* balancing test to this aspect of the delay in criminal proceedings makes eminent sense. The Sixth Circuit in *Walsh* v. *United States*, 358 F.2d 885 (6th Cir. 1965) cited *Pollard* v. *U. S.* as authority for examining the circumstances to decide if a Sixth Amendment or a due process violation has occurred in sentencing delay cases. Although in that case, the Sixth Circuit found no unreasonable delay, they did

examine the circumstances with the presumption that the delay was lawful.

There are close analogies between a delay in sentencing and a delay in deciding on a Motion for a New Trial. Under the Federal Rules of Criminal Procedure, a Motion for a New Trial must be made seven days after the verdict. (F.R.C.P. 31) However, under Rule 30 of the Federal Rules of Criminal Procedure, the sentence must be handed down without unreasonable delay. Therefore, it is clear that the motion for a new trial will often be made before the sentence is announced. The effect of a delayed entence is to delay the defendant's beginning of his appellate proceedings and to delay the start of the defendant's imprisonment. It is in the defendant's interest to place behind him the penalty portion of his criminal conviction, and begin his life as one who has paid his debt.

Furthermore, this defendant has had for seven years, and still has, the fear and handicap of knowing that he is under sentence to spend time in jail and time on probation. This defendant has been out on bond for seven years, which is over twice as long as the probationary period he was sentenced to. Within that time he has not violated his bonding conditions nor been in trouble with the law. But, he still faces a probationary period in which he will be required to again live with restrictions on his freedom and the necessity to prove to the Courts his ability to remain out of trouble with the law. This delay has, thus, effectively tripled the period of time during which HOUSTON WILLIAMS has had to fear the consequences of getting in trouble with the law, the possibility of parole revocation and a sentence to spend the entire three-year period in jail.

This Court should follow its precedent in the *Walsh* decision and the precedents of the Fifth Circuit in *U. S.*

v. *Campbell* and *Juarez-Casares* v. *U. S.* and examine the constitutional dimensions of this delay in deciding this Motion for a New Trial. Applying the *Barker* v. *Wingo* balancing test to this possible due process violation, the length of the delay in deciding this Motion was a completely unreasonable seven years and three months. The prosecution can show absolutely no reason for this delay. There was no pressing need to make an extensive study. There was no need for a further hearing or to wait for further evidence. It was merely a motion taken under advisement and, therefore, the Government cannot prove any rational basis for spending seven plus years in deciding one Motion. Although the defendant did not assert his right to a speedy decision on this Motion, this factor should not be weighed heavily in deciding whether a constitutional violation has occurred in this case. As the Fifth Circuit recognized in *Campbell*, defendants are placed in a difficult position when forced to demand that they be imprisoned in order to later assert their constitutional rights. The prejudice to the defendant in this case has been that for seven years he has been under the threat of being incarcerated at any time that a decision should be made on this Motion and the decision should be adverse to him. Throughout this time, the defendant has been forced to abide by the conditions on his freedom set by his bond. The defendant has not been allowed to place behind him this criminal conviction and continue on with his life as a citizen not in conflict with the law.

During this seven years, the defendant has remained free of further criminal contacts with the law and, thus, has amply shown that the need for a three-year probationary period has passed. All the possible goals of a three-year probationary period have been met by this defendant's seven years as a law-abiding citizen with restrictions of bail and with the fear that within a short

period of time, he could be incarcerated. This long period of time has maximized the anxiety of the defendant. He has been fearful throughout this period of the impending threat of incarceration and of the impending threat of parole revocation if he got in trouble with the law during this waiting period.

The delay has directly prejudiced defendant's rights to a meaningful appeal on all the issues. During this long delay the notarized copy of Donna Holloway's Affidavit, contradicting facts set forth in the search warrant affidavit, has been lost. If the Court was to require a hearing on the search warrant affidavit, the witness's loss of memory as to the particulars of this incident during the seven-year delay would prejudice the defendant in attempting to meet his burden of proof under *Franks* v. *Delaware*, *supra*. But for this delay the affidavit would not have been mislaid and the witness would have been able to reconstruct her testimony contradicting the search warrant affidavit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DALE QUILLEN

CERTIFICATE OF SERVICE

I hereby certify that I did this 13th day of April, 1979, mail 3 copies of the foregoing Petition for Writ of Certiorari to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

DALE QUILLEN

APPENDIX

No. 78-5414

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs

HOUSTON WILLIAMS,
Defendant-Appellant

ORDER

(Filed February 16, 1979)

Before WEICK, CELEBREZZE and LIVELY, Circuit Judges.

Defendant Williams was convicted by a jury in the District Court on one count of a ten count indictment which charged separate violations of the Travel Act (using a facility of interstate commerce to further an illegal activity, here, gambling). 18 U.S.C. § 1952. A mistrial was declared by the Court on seven other counts after the jury was unable to agree; two other counts had been dismissed by the District Court. Williams was fined $3,000 and was sentenced to three years imprisonment, with all but 120 days suspended. He moved for a new trial and also for judgment of acquittal, which motion was heard by District Judge Gray on January 7, 1971. The Judge promptly denied the motion for acquittal, and did not rule on the motion for a new trial. More than seven years elapsed. The Government filed a motion requesting the Judge to rule on the motion, and also wrote him a number

of letters containing the same request, but the letters were ignored. The defendant was free on bond. He made no request for a ruling. The Judge took Senior status and died on September 6, 1978. The motion was heard and was denied by another District Judge.

The principal issue on appeal is whether defendant was denied his right to a speedy trial by the Judge's failure to rule on defendant's motion for a new trial. The truth is that defendant had a speedy trial. He obviously was satisfied with the inaction of the Judge, because he was free on bond and was not required to pay the $3,000 fine or to start serving his sentence. Thus, even applying the standards applicable to speedy trial, defendant's contention must fail because of his acquiescence in the delay, and his failure to protest.

The prosecution did all that it could to persuade the District Judge to rule on the motion, short of filing a mandamus proceeding against him in the appellate court.

We find no prejudicial error in the proceedings challenging the validity of the search warrant, in the admission or exclusion of evidence, in the instructions of the Court to the jury, or in the denial of motions for judgment of acquittal. The verdict of the jury was supported by substantial credible evidence.

The judgment of conviction is affirmed.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CRIMINAL NO. 14,625

UNITED STATES OF AMERICA

v.

HOUSTON WILLIAMS

ORDER

(Filed April 28, 1978)

The court having familiarized itself with the record in this case, having had the pertinent portions of the record thereof read to it, and the court feeling satisfied that pursuant to Rule 25 of the Federal Rules of Criminal Procedure it can properly dispose of the issues raised in this case, it is ORDERED that Item No. 7 of the motion for new trial previously taken under advisement in this cause be and the same hereby is denied.

/s/ L. Clure Morton
Chief Judge

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CRIMINAL NO. 14,625

January 7, 1971

UNITED STATES OF AMERICA

vs.

HOUSTON WILLIAMS

(Filed February 3, 1971)

This case was called January 7, 1971, for a hearing of defendant's pending motions heretofore filed. The appearance of the defendant was waived by his counsel, Dale Quillen and R. Price Nimmo, who appeared on behalf of the said defendant. The Government appeared by Assistant United States Attorney Fred D. Thompson.

After hearing argument of counsel, the Court ORDERED that the defendant's Renewed Motion for Judgment of Acquittal be denied.

After hearing argument of counsel relative to the defendant's Motion for New Trial, the Court ORDERED that Items 1, 2, 3, 4, 5, 6, 8, 10, 11, and 12 of the said motion be denied, Item 9 of the said motion having been treated as withdrawn upon request of the defendant's counsel.

It is further ORDERED that Item 7 of the Motion for New Trial is hereby taken under advisement, the Government to file a response to the said Item of the defendant's Motion for New Trial.

It is ORDERED that the defendant be allowed to remain on his present bond pending disposition of pending matters.

Enter:

/s/ Frank Gray, Jr.
United States District Judge

Approved for Entry:

/s/ Fred D. Thompson
Assistant United States Attorney

SUPREME COURT OF THE UNITED STATES

No. A-810

HOUSTON WILLIAMS,
Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 17, 1979.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 16th day of March, 1979.

Supreme Court, U. S.
FILED
JUN 15 1979
MICHAEL RODAK, JR., CLERK

No. 78-1581

In the Supreme Court of the United States

OCTOBER TERM, 1978

HOUSTON WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN F. DEPUE
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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No. 78-1581

HOUSTON WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. A-1 to A-2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1979. On March 16, 1979, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including April 17, 1979 (Pet. App. A-6), and the petition was filed on April 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to an evidentiary hearing on his allegations of factual misrepresentations in a search warrant affidavit.

2. Whether the delay between the hearing on petitioner's motion for a new trial and the decision on that motion denied petitioner his right to a speedy trial.

STATEMENT

1. Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of using interstate facilities to conduct an illegal gambling operation, in violation of 18 U.S.C. 1952.[1] On November 13, 1970, petitioner was sentenced to pay a $3,000 fine and to three years' imprisonment with all but the first 120 days suspended. He was placed on probation for the remainder of the term.

On November 27, 1970, petitioner moved for a judgment of acquittal and a new trial. The trial judge conducted a hearing on the motions on January 7, 1971, and denied the motion for judgment of acquittal at that time. He also denied relief on all but one of the grounds advanced to support the new trial motion and took the remaining issue under advisement (Pet. App. A-4). The trial judge died without ruling on the reserved question (*id.* at A-2). On April 28, 1978, the judge to whom the case had been reassigned denied relief on the remaining issue (*id.* at A-3).

The court of appeals affirmed petitioner's conviction and held that petitioner was not prejudiced by the delay between the hearing and determination of his motion for a new trial (Pet. App. A-1 to A-2).

---

[1]Petitioner was originally indicted on 10 counts alleging violations of the Travel Act, 18 U.S.C. 1952. One count was severed, and another was dismissed on petitioner's motion at the conclusion of the government's case. The jury was unable to reach a verdict on the remaining seven counts, and a mistrial was declared as to them (II Tr. 210-213).

2. Prior to trial, petitioner moved to suppress certain evidence that was seized as the result of a warrant-authorized search of his residence. The affidavit of FBI Agent John Rodgers that accompanied the application for the search warrant stated that in January 1970 petitioner admitted to the agent that he had run a "football card" during the 1969-1970 football season and that the agent had later observed petitioner's automobile parked outside a Nashville, Tennessee, apartment house. It further stated that an informant, who had previously provided reliable information concerning violations of federal law, told the agent that petitioner was running a wagering operation within the apartment house and that petitioner made daily long distance telephone calls from various telephone booths to persons in another state in order to obtain the odds on scheduled sporting events (Pet. 8-9).

Petitioner alleged in his suppression motion that the information in the affidavit with respect to the reliability of the informant was misleading and false. In addition, petitioner contended that the information reportedly provided by the informant was incorrect and that the affidavit was so vague as to be an insufficient basis for the issuance of a warrant. In support of these claims, petitioner allegedly submitted an affidavit of Donna Holloway. The Holloway affidavit recited that she had told Agent Rodgers that petitioner was running a bookmaking operation and that petitioner was making long distance telephone calls but that she did not tell the agent that the calls were made to persons in other states because she had no way of knowing that fact (Pet. 10-11).

During a pretrial hearing, petitioner sought to introduce testimony from Holloway to demonstrate that she was not, in fact, a reliable informant, as alleged in the

search warrant affidavit (H. Tr. 9, 11-12, 15).[2] The district court ruled that petitioner could not present testimony that tended to impugn the accuracy of the facially sufficient affidavit. Petitioner was permitted, however, to question Agent Rodgers concerning his knowledge of any false statements in the affidavit and his coercion of the informant (H. Tr. 9, 12, 13). The agent testified that he did not pressure the informant in any way and that to his knowledge the statements in his affidavit were true (H. Tr. 15-16). The court then denied the motion to suppress (H. Tr. 19).

ARGUMENT

I. Relying upon *Franks* v. *Delaware*, 438 U.S. 154 (1978), petitioner contends (Pet. 15) that the trial judge improperly prevented him from eliciting testimony concerning the truthfulness of certain factual allegations in the search warrant affidavit.[3] However, petitioner failed to satisfy the prerequisites for the introduction of such evidence. The Court held in *Franks* (438 U.S. at 171):

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. *There must be allegations of deliberate falsehood or of reckless disregard for the truth, and*

[2]"H. Tr." refers to the transcript of the pretrial hearing on October 13, 1970.

[3]Petitioner's attack on the veracity of the allegations in the search warrant affidavit occurred prior to the decision in *Franks*. The Court has consistently refused to accord Fourth Amendment decisions retroactive effect. See *United States* v. *Peltier*, 422 U.S. 531, 535 (1975). There is no need to consider the retroactivity problem in this case, however, because, as we show below, petitioner's challenge to the affidavit was insufficient under *Franks* to require an evidentiary hearing.

> *those allegations must be accompanied by an offer of proof*. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any governmental informant. [Emphasis added.]

While petitioner's motion alleged that the statements regarding the reliability of the informant were misleading and false, it made no allegation of deliberate falsehood or reckless disregard for the truth. This deficiency was not cured during the pretrial hearing, when petitioner sought to examine Holloway and Agent Rodgers to establish the informant's unreliability. The additional allegation that the information given to the agent by the informant was untrue is irrelevant, because the alleged falsity must be that "of the affiant, not of any nongovernmental informant" (438 U.S. at 171).

Moreover, the Holloway affidavit does not satisfy the requirement that the request for a hearing under *Franks* be accompanied by a prima facie showing that the affiant's statements were intentionally or recklessly false.[4]

[4]The Holloway affidavit is not part of the record. Although petitioner contends that the affidavit was filed but subsequently mislaid (Pet. 9, 24), there is no indication that it was ever appended to the suppression motion or introduced during the suppression hearing. The document is not contained in the record of the district court, nor does reference to it appear in the suppression motion, the transcript of the suppression hearing, or the docket entries. Petitioner's reliance on the purported affidavit should therefore be disregarded. See Fed. R. App. P. 10(a); *Rosen* v. *Lawson Hemphill, Inc.*, 549 F. 2d 205, 206 (1st Cir. 1976).

Although the principal claim of falsity in the suppression motion was that Agent Rodgers misrepresented the informant's reliability, the Holloway affidavit does not address that matter at all. Rather, it relates to an entirely different subject—whether the informant actually told the affiant that petitioner's long distance telephone calls were made to out-of-state contacts. Furthermore, while the Holloway affidavit contains a denial that the informant told Agent Rodgers that petitioner made interstate telephone calls, it fully corroborates all the other particulars contained in the search warrant affidavit. Finally, petitioner's claim (Pet. 15) that the district court precluded him from examining Agent Rodgers as to the truthfulness of certain allegations in the affidavit is erroneous. To the contrary, the court specifically stated that "the defendant is entitled if he desires to interrogate [the agent] with reference to his knowledge of any false, allegedly false, statements in the affidavit * * *" (H. Tr. 9).

2. Citing *Barker* v. *Wingo*, 407 U.S. 514 (1972), petitioner contends (Pet. 20) that the delay between the hearing and disposition of his motion for a new trial constituted a denial of his Sixth Amendment right to a speedy trial. *Barker*, however, involved delays between arrest and trial and did not consider whether the right to a speedy trial extends to post-trial proceedings. See *Brooks* v. *United States*, 423 F. 2d 1149, 1152-1153 (8th Cir. 1970), cert. denied, 400 U.S. 872 (1971). Nor is petitioner's claim aided by cases holding that sentence must be imposed within a reasonable time after return of the verdict. See *United States* v. *Campbell*, 531 F. 2d 1333 (5th Cir. 1976); *Juarez-Casares* v. *United States*, 496 F. 2d 190 (5th Cir. 1974). Sentencing is an integral part of the criminal trial process, and Rule 32(a), Fed. R. Crim. P., expressly provides that "[s]entence shall be imposed without unreasonable delay." By contrast, a motion for a

new trial is not a part of the trial but is an optional post-trial proceeding, and the district court is not expressly required to act upon it within any particular time. See Fed. R. Crim. P. 33.

In any event, even applying the standards of *Barker* v. *Wingo*, *supra*, the delay in ruling on petitioner's motion did not deprive him of his right to a speedy trial. Although more than seven years elapsed between the hearing on the motion and its ultimate resolution, petitioner was free on bond during that period and was not required to pay the $3,000 fine or to begin service of his sentence. As he concedes, he made no request for a ruling, nor did he ever assert a right to the speedy disposition of his motion (Pet. 23). On the other hand, the delay was not occasioned by the prosecution's misconduct or lack of diligence. As the court of appeals observed (Pet. App. A-2), "[t]he prosecution did all that it could to persuade the District Judge to rule on the motion, short of filing a mandamus proceeding against him in the appellate court."

Petitioner's claim (Pet. 24) that the delay prejudiced his ability to prosecute an appeal is wholly unconvincing. The alleged loss of the original copy of the Holloway affidavit is inconsequential. As we have stated, nothing in the record suggests that it was ever introduced in evidence or brought to the district court's attention, and even assuming that it was, the allegations in the suppression motion and Holloway affidavit were insufficient to warrant a hearing under *Franks* v. *Delaware*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN F. DEPUE
Attorney

JUNE 1979

DOJ-1979-06